In this connection it is significant that the Muslims Ordinance (Ord. No. 25 of 1957) provides by section 7(5) that the provisions of that section relating to "walis" shall not apply where the woman to be wedded belongs to a school of law under which she can be married *without the consent of her guardian.* The language of this subsection pre-supposes the existence of a lawful guardian; otherwise why should it refer to the immateriality of the consent of her guardian? Furthermore, *Wilson* on Anglo-Mohamedan Law, 6th edition, section 111 states that an unmarried girl who has attained puberty must necessarily have a guardian — who is her father, in the first instance. *Mulla* confirms this in section 357 of his Principles of Mohamedan Law, 14th edition. It is obvious that Muslim law distinguishes between guardianship for different purposes and a girl's freedom to marry without the guardian's consent does not necessarily deprive her of guardianship for all other purposes until marriage.

In my opinion the expression "lawful guardian" in section 361 of the Penal Code must be given a meaning which accords with the provisions of section 5 of the Guardianship of Infants Ordinance and the explanation to section 361. If, in its discretion, the Court decides to modify its strict construction of who the guardian is, it may have recourse to Muslim law so as to do justice to the facts of any particular situation. All I hold now is that, for the purposes of this case, it was wrong to say that the girl in question had no lawful guardian. In the absence of any other evidence the lawful guardian from either point of view was her father until her marriage.

I accordingly called upon the respondent for his defence — the learned District Judge had ceased to hold that office and I wished to avoid, in the interest of all concerned, a retrial before another — having regard to the technical nature of the offence committed. The respondent pleaded guilty and I awarded him an absolute discharge in all the circumstances of the case and in particular as it had been shown that the couple had eloped by mutual consent to escape the objections of her father and had in fact got married.

Respondent discharged.

PUBLIC PROSECUTOR v. TAN SIEW MIN & ANOR.

[A.Cr.J. (Suffian J.) November 8, 1962]

[Alor Star — Kedah Criminal Appeal No. 68 of 1962]

Road Traffic Ordinance, 1958, ss.120(2) and 141(3) — Overloading — Certificate of Inspector of Weights and Measures — Copy for accused — Criminal Procedure Code (Cap. 6), s.399(i).

Criminal Evidence — Proof of overloading — Road Traffic Ordinance, 1958, s.141(3).

The first and second respondents were the driver and owner respectively of the lorry in question. The first respondent was charged with using the lorry on the road carrying a load above its permitted weight and with quitting the lorry without having stopped the engine contrary to rule 14(1) of the Road Traffic Rules, 1959. The second respondent was charged with permitting the use of the lorry for the carriage of goods in excess of the permissible laden weight an offence punishable under section 120(2) of the Road Traffic Ordinance. Both claimed trial. The prosecution during the course of their case put in two certificates by the Inspector of Weights and Measures, Kedah, which stated that the weigh-bridge had been verified and found to be just. At the end of the prosecution case the learned Magistrate without calling on their defence acquitted and discharged both the accused. The Public Prosecutor appealed.

Held: (1) there was no evidence that the Inspector of Weights and Measures, Kedah, was in charge of the weigh-bridge and therefore both the certificates were inadmissible as hearsay evidence and under section 399 of the Criminal Procedure Code because there was no proof that copies of the certificates had been supplied to the respondents as required by the proviso to sub-section (i) of that section;

(2) in view of the common sense meaning of proof and on the facts of this particular case the lorry being overloaded by three tons it was open to the learned Magistrate to find a *prima facie* case that the lorry was overloaded.

Observations of the admissibility of evidence under section 141(3) of the Road Traffic Ordinance.

Cases referred to:—

(1) *Public Prosecutor* v. *Sam Ah Kow* [1955] M.L.J. 1.

(2) *Deputy Public Prosecutor* v. *Dollah bin Aziz* [1950] M.L.J. 250.

(3) *Penny* v. *Nicholas* [1950] 2 All E.R. 89.

(4) *Public Prosecutor* v. *Ng Fah* [1954] M.L.J. 150.

(5) *Public Prosecutor* v. *Ginder Singh & Chet Singh* [1948] M.L.J. 194.

(6) *Public Prosecutor* v. *Sundram* [1955] M.L.J. 159.

MAGISTRATE'S CRIMINAL APPEAL.

Hamzah bin Dato' Abu Samah (Senior Federal Counsel) for the appellants.

A. Jayadeva for the respondent.

Suffian J.: On 6th December, 1961 at about 10.55 p.m., a party of traffic policemen led by the O.C. Traffic, PW1, stopped a lorry at Simpang Kuala, Alor Star. It came to a stop, whereupon both the driver and the conductor of the lorry bolted, leaving the engine still running. The police switched it off and waited until 12.15 a.m. but nobody came forward. So the lorry was driven away and taken to the weigh-bridge at the Alor Star Police Station. There it was weighed and found to be well above 160 cwt., its maximum permissible laden weight.

The first respondent was subsequently charged as a driver with, first, using the lorry on the road carrying a load above its permitted weight, an offence punishable under section 120(2) of the Road Traffic Ordinance, 1958, and secondly, with quitting the lorry without having stopped the engine, an offence against rule 14(1) of the Road Traffic Rules, 1959, and punishable under

section 146(1) of the Ordinance. The second respondent was charged as its owner with permitting the use of the lorry for the carriage of goods in excess of the permissible laden weight, an offence punishable under section 120(2) of the same Ordinance. Both claimed trial and at the end of the prosecution case the learned Magistrate without calling on their defence acquitted and discharged both the accused

The Public Prosecutor appeals.

The learned Magistrate found that there was no *prima facie* case against the respondents on the ground that the prosecution had failed to prove that at the material time the first respondent was the driver and the second respondent the owner.

However, when writing his grounds, he admitted that he was wrong on this. I agree. On the day following at about 8.30 a.m. the first respondent went to the O.C. Traffic and claimed that he was the driver. Half an hour later he "claimed" the lorry from PW7, Abu Bakar bin Mahmud, Sgt. 7995. These were statements made to police officers and would ordinarily have been shut out by section 113 of the Criminal Procedure Code, but by virtue of section 141(3) of the Road Traffic Ordinance, 1958 they were admissible.

Mr. Jayadeva made two points about these statements. First, he said that the first respondent told PW1 he was the driver but he never said that he was so at the material time, while he told PW7 that he claimed the lorry, which remark should be considered in the light of the evidence that the theft of the lorry had been reported to the police by a Chinese, not any of the respondents. Secondly, he said that if the first respondent's statement was made in answer to a question put to him by the police officers, the question being who drove the lorry at the material time, as was suggested by the learned Deputy Public Prosecutor, then it was not admissible. Dealing with the second point first, in my judgment sub-section (3) of section 141 makes clear that any statement made to a police officer that a particular vehicle was being driven by the person making the statement is admissible for the purpose of determining by whom the vehicle was being driven, it being immaterial whether the statement was in answer to questions or not. As to the first point, the first respondent's statement to PW1 and PW7 should be considered in the light of the context The driver had fled into the darkness, likewise his conductor. The lorry had been seized and the police were anxious to know who had been driving it at the material time, when who should turn up but the first respondent. He, in the words of PW1, "came and claimed that he was the driver of the lorry..... told me that he had also brought his conductor." This is at least *prima facie* evidence that he was the driver at the material time, for the report to the police of the theft of the lorry might well have been a subtle attempt to throw the police off the scent.

As regards the second respondent there was *prima facie* evidence that he was the owner. The lorry carried a Carrier's Licence, P-3, which PW1 took off it. It gave Low Bak Chua alias Low Bak Chuah of 29, Pengkalan Kapal, Alor Star, as its authorised licensee. PW7 said that the side of the lorry was inscribed "Loh Bak Chuan of No. 29, Pengkalan Kapal, Alor Star." Rule 86 of the Motor Vehicles (Construction and Use) Rules, 1959 requires the owner to cause his name and address to be marked on the sides of his lorry. The spelling of these two names is not the same as the spelling of the second respondent's name on the record. Nevertheless giving due allowance to the vagaries of Romanising Chinese names the learned Magistrate would have been entitled to regard this. as he later admitted. as *prima facie* evidence that the second respondent was the owner of the lorry. particularly as the second respondent's address is given in the police report Exhibit P-2 as 29, Pengkalan Kapal, Alor Star.

I will now come to a more difficult point.

This lorry was weighed by PW7. On the first occasion he found that it weighed 243 cwt. 70 lbs., that is 83 cwt. 70 lbs. in excess. This was at 1.00 a.m. on December 7, 1961. Later at 9.00 a.m. when the first respondent came and claimed the lorry it was weighed again, this time with an attendant on board. It was found to weigh 244 cwt. 70 lbs., that is 84 cwt. 70 lbs. in excess. The result of the first weighing is recorded in Exhibit P-1, the second weighing in Exhibit D-8. A copy of D-8 was supplied by PW7 to the first respondent, under section 53(2). It has no bearing on the question of whether or not the weigh-bridge was accurate.

This question is important because it is for the prosecution to prove that the lorry was carrying excess weight. In order to do this, they must call evidence showing or from which it may be presumed that the instrument used for weighing the lorry was accurate. Section 3 of the Evidence Ordinance, however, says that "a fact is said to be 'proved' when, after considering the matters before it, the Court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists." This does not mean that the prosecution must prove that the weigh-bridge was 100% accurate, *Public Prosecutor* v. *Sam Ah Kow* [1]. The principle applicable to the accuracy of a stop-watch used for detecting speeding motorists is applicable to the accuracy of a weighing machine.

That principle is laid down by Murray-Aynsley C.J., Singapore in *Deputy Public Prosecutor* v. *Dollah bin Aziz* [2] following Lord Goddard, Lord Chief Justice, in *Penny* v. *Nicholas* [3] as follows:—

"The first observation is that the prosecution has to prove its case in these matters in the same way as in any other, neither more nor less. An excessive scepticism on

the part of those who have to decide these cases may result in defeating the ends of justice just as much as excessive credulity. In the first place the Court must be satisfied that the prosecution has been honestly conducted and that the tests have been conducted with reasonable competence.

Once satisfied on this point the Court should remember that the means available to the police do not render it possible to determine the speed of a vehicle with any high degree of accuracy. If the police calculations show only a slight excess of speed the offence has not been proved. I think that a good working rule would be to expect a probable error of about 15 per cent. Once this is accepted Magistrates need not worry unduly about the accuracy of instruments used.....

It should be remembered that in all measurements there is some degree of error. What is important is to know the probable degree of error. In this sort of case it is out of place to expect laboratory standards or even the standards attained in timing athletic events.

In these matters Magistrates must rely on common sense and section 15 of the Evidence Ordinance.

Common observation shows that yard measures ordinarily sold are about a yard long and a stop-watch by a reputable maker gives approximately the right time. The speedometer ordinarily fitted to a car is not a very accurate instrument, but, with the margin I have indicated above, is usually sufficiently accurate for the purpose.....

The present position is, therefore, that it is open to Courts to convict on the strength of evidence of observations made with instruments without evidence of the accuracy of those instruments....."

Normally the average man, even if he is a businessman, would presume that a weigh-bridge owned and maintained by Government is 100% accurate. Here, however, the prosecution has placed themselves in an awkward position. Without being invited by the defence to prove the accuracy of the weigh-bridge, they put in two certificates P-5 and P-6 which are in the following terms:—

"**Exhibit P-5** **Certificate of Examination**

This is to certify that on 21st February, 1961 the Fifteen Tons Pooley Weigh-bridge at Police District Headquarters, Alor Star, has been verified by comparison with the Kedah standard weights, and has been found to be just.

Tahir bin Haji Yasin
Inspector of Weights & Measures, Kedah.

Exhibit P-6 **Certificate of Examination**

This is to certify that on 9th December, 1961 the Fifteen Ton Pooley Weigh-bridge at Police District Headquarters, Alor Star, has been verified by comparison with Kedah standard weights and has been found to be just.

Tye Ong Choon
Inspector of Weights & Measures, Kedah."

P-5 certified that the weigh-bridge was just on the 21st February, 1961 while P-6 on 9th December, 1961. The prosecution submitted these certificates without calling their signatories, presumably under section 143(7). But that provision reads:—

"When in any proceedings it is necessary to prove the weight unladen or laden of any vehicle or the weight of any load carried on any vehicle a certificate purporting to be signed by any public servant in charge of the weigh-bridge or weighing machine on which the said vehicle or load was weighed, and certifying —

(a) that such weigh-bridge or weighing machine had been examined within the previous eight months and found to be accurate; or

(b) .....

shall be accepted by any Court as *prima facie* proof of the facts certified in such certificates."

But with reference to the words underlined, here there is no evidence that each of the signatories of P-5 and P-6 was in charge of the weigh-bridge and therefore both the certificates were inadmissible and should have been ignored as hearsay evidence. Without that evidence there is no proof that the weigh-bridge is absolutely accurate. Equally this evidence was inadmissible under section 399 of the Criminal Procedure Code, because there was no proof that copies of the certificates had been supplied to the respondents as required by the proviso to sub-section (i), *Public Prosecutor* v. *Ng Fah* (4). Nevertheless in view of the common sense meaning of proof, on the facts of this particular case it was open for the learned Magistrate to find a *prima facie* case that the lorry was overloaded. Here we are not dealing with an excess weight of 1 oz. or 1 lb. or even 1 cwt. but 84 cwts. and 70 lbs., that is over three tons and when the lorry was stopped both its driver and attendant scooted off. In view of this, this case is remitted to the learned Magistrate with a direction that he should call on the two respondents to enter into their defence.

If on considering the first respondent's evidence, the learned Magistrate decides to acquit him on the overloading charge, he should not acquit the second respondent also without first considering the effect of *Public Prosecutor* v. *Ginder Singh & Chet Singh* (5), *Public Prosecutor* v. *Sundram* (6) and section 138 of the Road Traffic Ordinance.

Order accordingly.

Solicitors: *Jayadeva & Zahir.*